IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. STEVEN LEE McCLAIN, Petitioner.	)	2 CA-CR 2006-0207-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20002424

Honorable Charles S. Sabalos, Judge

REVIEW GRANTED; RELIEF DENIED

Leonardo & Roach, L.L.C.
By Nathan D. Leonardo
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Attorneys for Petitioner

E S P I N O S A, Judge.

¶1 Petitioner Steven McClain seeks review of the trial court's denial of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S. We review the court's ruling for an abuse of discretion, *see State v. Decenzo*, 199 Ariz. 355, ¶ 2, 18 P.3d 149, 150 (App. 2001), and find none.

¶2 After he was charged in July 2000 with twenty-seven counts of sexual abuse and child molestation involving two victims during the previous ten years, McClain pled no contest pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970), to one count of attempted child molestation of Amber "and/or" Jessica.[1] Shortly before sentencing, McClain moved to withdraw his plea on the ground he had done nothing wrong. The trial court denied the motion and placed McClain on probation for twenty years. Three years later, McClain filed a notice of post-conviction relief, asserting that an unsolicited videotape recording from Jessica constituted newly discovered evidence that cast doubt on his guilt.

¶3 McClain eventually filed a post-conviction petition claiming that Jessica had recanted her initial allegations that he had sexually abused her. He also asserted Jessica's recantation cast doubt on Amber's claims that he had sexually abused her. The trial court ruled McClain had not stated a colorable claim as his conviction related to Amber and conducted an evidentiary hearing on the claim involving Jessica.[2] After hearing testimony from both Amber and Jessica and their mother, the trial court denied McClain's petition.

¶4 On review, McClain contends that the trial court committed "manifest legal error" in denying post-conviction relief and that a more liberal standard of review ought to

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[1]Although the parties and the trial court consistently referred to it as a guilty plea, we note that a plea entered pursuant to *Alford* is actually a no contest plea as recognized in Rule 17.1(c), Ariz. R. Crim. P., 16A A.R.S.

[2]Coincidentally, on the day of the evidentiary hearing, the trial court also revoked McClain's probation and sentenced him to a mitigated, five-year prison term after McClain admitted having violated a condition of his probation.

apply to claims of newly discovered evidence raised by defendants who entered no contest pleas pursuant to *Alford*. We disagree with both contentions.

¶5 McClain is correct that our supreme court has reviewed for an abuse of discretion a trial court's ruling on a motion for new trial based on a claim of newly discovered evidence. *See State v. Hickle*, 133 Ariz. 234, 238, 650 P.2d 1216, 1220 (1982). He also correctly notes the supreme court has not expressly addressed the standard of review that applies to a newly discovered evidence claim raised by a defendant who entered a plea pursuant to *Alford*. But Division One of this court has applied an abuse of discretion standard in such a case, *State v. Fritz*, 157 Ariz. 139, 140-41, 755 P.2d 444, 445-46 (App. 1988), and we see no reason to apply a different one since that standard applies to review of a trial court's ruling on a post-conviction claim regardless of the type of claim raised. *See Decenzo*, 199 Ariz. 355, ¶ 2, 18 P.3d at 150; *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990).

¶6 It is true that a defendant who pleads no contest pursuant to *Alford* engages in a risk-benefit analysis, *Duran v. Superior Court*, 162 Ariz. 206, 208, 782 P.2d 324, 326 (App. 1989), and that the strength of the state's case "is the primary inducement for the plea," *Fritz*, 157 Ariz. at 140, 755 P.2d at 445. But any defendant who accepts a plea offer has engaged in that type of analysis, and the strength of the state's case is always a compelling inducement whether a defendant decides to plead guilty or enter a no contest plea pursuant to *Alford*.

¶7 In any event, a trial court may permit a defendant to withdraw a plea of guilty or no contest when "necessary to correct a manifest injustice." Ariz. R. Crim. P. 17.5, 16A A.R.S. "The Rule is to be liberally interpreted, and doubts are to be resolved in favor of allowing withdrawal of the plea." *Duran*, 162 Ariz. at 207, 782 P.2d at 325. But when the request to withdraw a guilty or no contest plea is based on a claim of newly discovered evidence, additional requirements must be met. *See* Ariz. R. Crim. P. 32.1(e) (defendant entitled to post-conviction relief if defendant shows newly discovered material facts exist that would probably have changed verdict or sentence); *State v. Sanchez*, 200 Ariz. 163, ¶ 11, 24 P.3d 610, 613-14 (App. 2001) ("One of the requirements for newly discovered evidence pursuant to Rule 32.1, Ariz. R. Crim. P., is that the evidence have been in existence at the time of trial but not discovered until after trial.").

¶8 We find no abuse of discretion in the trial court's denial of post-conviction relief. In doing so, the court found as follows:

> The witness, Jessica Higuera, testified that she did not wilfully make false statements about the Petitioner's molestation of her in 1990, but, instead, came to the conclusion approximately one year after the Petitioner's Alford guilty plea and sentencing that her claim against him was inaccurate and prompted by her mother's emotional manipulation of her. Ms. Higuera's belief is speculative in nature and does not constitute a recantation because it is not a clear and unambiguous withdrawal or repudiation of her prior statements leading to the indictment and conviction of the Petitioner. Even if the testimony of Ms. Higuera could reasonably be construed as a recantation, such evidence of her knowledge of the invalidity of her allegations against the Petitioner did not exist at the time he entered his Alford guilty plea and was sentenced. Because Ms.

> Higuera's testimony does not qualify as newly discovered evidence which may have affected the Petitioner's decision to plead guilty or the Court's decision to accept his plea, the Petitioner's request for post conviction relief under Rule 32.1(e) is denied.

The evidence supports the court's findings and conclusions.

¶9 Jessica was equivocal in her testimony on whether she had believed she was lying at the time she made the allegations against McClain. She also said she had come to believe she had lied some time in the previous three years after McClain had pled no contest and been placed on probation. Moreover, she did not unequivocally testify that her mother had persuaded her to make up allegations against McClain. Finally, the court also heard from Amber who testified her mother had not influenced her allegations against McClain.

¶10 Accordingly, we grant the petition for review but deny relief.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge